UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 3:99 CR 200(CFD)
	:	Civil No. 3:02 CV 1192(CFD)
HENRY OCASIO	:	

RULING

Pending are Ocasio's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Docs. #158, 170], Motion for Leave to Amend 28 U.S.C. § 2255 Motion [Doc. #160], and Motion for Leave to Supplement 28 U.S.C. § 2255 Motion [Doc. #167].

I. Background

On February 2, 2000, the petitioner, Henry Ocasio ("Ocasio") pled guilty to Count One of an indictment charging him with conspiring to distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine, in violation of section 846 of Title 21 of the United States Code. As part of his plea, Ocasio stipulated that the relevant conduct for his base offense level under the Sentencing Guidelines involved 10 kilograms of cocaine and 7 kilograms of heroin. On June 18, 2001, Ocasio was sentenced to 135 months' imprisonment, to be followed by a 5-year term of supervised release.[1] Judgment entered on June 27, 2001. On July 6, 2001, Ocasio filed an appeal with the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed the judgment and sentence on April 4, 2002. Ocasio then filed the motions under consideration here.

[1]His guideline range was 135 to 168 months' imprisonment and four to five years' supervised release. The sentence was within the statutory maximum of twenty years under 21 U.S.C. § 841(b)(1)(C).

The Government has indicated that it does not object to Ocasio's Motion for Leave to Amend [Doc. #160] and Motion for Leave to Supplement [Doc. #167]. Accordingly, Ocasios's Motion for Leave to Amend [Doc. #160] and Motion for Leave to Supplement [Doc. #167] are GRANTED.

Ocasio appears to assert four grounds for relief in his now amended and supplemented motion under 28 U.S.C. § 2255: (1) ineffective assistance of counsel because (a) his counsel allowed Ocasio to plead guilty and stipulate to relevant conduct (related to the heroin) for which he was never "arrested or indicted"; and (b) his counsel failed to object to an upward departure from Ocasio's guidelines range as to supervised release; (2) this Court erroneously permitted the United States to "constructively amend" the indictment by including in Ocasio's sentencing guidelines calculation the quantity of heroin; (3) this Court violated Rule 11 (of the Federal Rules of Criminal Procedure) by failing to inform him of the nature and significance of his supervised release term; and (4) the United States committed "misconduct" because there was no evidence that Ocasio was involved in any conspiracy until *after* the seizure of cocaine from one of Ocasio's co-defendants.[2]

II. Discussion

A. Ineffective Assistance of Counsel Claims

The United States Supreme Court has established a two-prong test for evaluating claims of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). To obtain relief, a

[2]The Court concludes that an evidentiary hearing is not warranted in this case, as no factual issues exist. Moreover, district courts are not required to hold a hearing where "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. See, e.g., Pham v. United States, 317 F.3d 178, 184 (2d Cir. 2003); Chang v. United States, 250 F.3d 79, 85 (2d Cir. 2001); Santiago v. United States, 2004 WL 413270, *2 (D. Conn. 2004).

defendant must show that his lawyer's performance fell below an objective standard of reasonableness and that, but for his lawyer's errors, the result of the proceeding probably would have been different. See McKee v. United States, 167 F.3d 103, 106 (2d Cir. 1999); DeLuca v. Lord, 77 F.3d 578, 584 (2d Cir. 1996). In the context of guilty pleas, the second prong is met where a defendant establishes that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). "A criminal defendant considering whether to plead guilty is entitled to the informed, professional advice of his counsel." United States v. Thomas, 74 Fed. Appx. 113, 115 (2d Cir. 2003). Counsel should communicate to the defendant information such as the terms of the plea offer, the strengths and weaknesses of the case against the defendant, and the comparative sentence exposure between standing trial and accepting a plea offer. See Purdy v. United States, 208 F.3d 41, 44-45 (2d Cir. 2000); United States v. Gordon, 156 F.3d 376, 380 (2d Cir. 1998). However, "the ultimate decision whether to plead guilty must be made by the defendant." Purdy, 208 F.3d at 45. In addition, the United States Supreme Court has recognized that "there are countless ways to provide effective assistance in any given case" and has cautioned against post hoc criticisms of counsel's strategy. See Strickland, 466 U.S. at 689.

1. Relevant Conduct

Ocasio alleges that his counsel, Attorney David Touger, provided ineffective assistance of counsel by advising Ocasio to stipulate in his plea agreement to not only the cocaine, but also the quantity of heroin. He argues that Attorney Touger advised him to enter into the plea agreement with the stipulation of 10 kilograms of cocaine and 7 kilograms of heroin, but the heroin was related to a

different conspiracy than the one charged. Ocasio further argues that Attorney Touger relieved the Government of meeting its burden of proving the heroin quantity beyond a reasonable doubt by advising Ocasio to stipulate to these drug quantities. However, these claims are not supported by the record or the law, and much of them has already been decided by the Second Circuit on Ocasio's direct appeal.

The undisputed facts do not establish that Attorney Touger's performance fell below the "objective standard of reasonableness." Instead, the undisputed facts indicate that Attorney Touger provided Ocasio with sound legal advice. In exchange for Ocasio's guilty plea, the Government agreed to (1) recommend a sentence at the low end of the Guidelines range; (2) recommend a three-level reduction in the sentencing guidelines calculation of Ocasio's offense level for full and complete acceptance of responsibility; (3) refrain from filing a Notice of Prior Felony Drug Conviction pursuant to 21 U.S.C. § 851, which would have exposed Ocasio to a mandatory minimum term of ten years' imprisonment; and (4) stipulate to a two-level role enhancement and abandon arguments for either a three or four-level role adjustment. The Government also agreed to cap Ocasio's relevant offense conduct at 10 kilograms of cocaine and 7 kilograms of heroin. Under oath at the change of plea hearing on February 2, 2000, Ocasio stated that he had reviewed the plea agreement and stipulation of offense conduct with Touger, that he understood the terms of the agreement, and that he desired to plead guilty.

On March 14, 2001, approximately three months before sentence was imposed, the Court conducted a hearing to address various sentencing matters and the effect of the Supreme Court's intervening decision of June 26, 2000 in Apprendi v. New Jersey, 530 U.S. 466 (2000) on Ocasio's guilty plea and his plea agreement. At the hearing, Attorney Touger explained that Ocasio agreed to

waive his rights under Apprendi to have a grand jury and a trial jury make certain findings of fact, including the quantity of cocaine involved in the conspiracy charged in the indictment. However, Attorney Touger pointed out that Ocasio reserved his right to appeal on two bases under Apprendi: (1) that Apprendi required that sentencing guidelines calculations of drug quantities be found by a jury beyond a reasonable doubt, and (2) the Court could not consider the seven kilograms of heroin as relevant conduct under the guidelines as it was not charged in the indictment.[3] Attorney Touger not only reserved these arguments prior to sentencing, but also raised them subsequently on direct appeal to the Second Circuit.[4]

Even if Ocasio could demonstrate that Touger's performance fell below the "objective standard of reasonableness" - - and he has not - - his claim still fails because he cannot show that the outcome would have been different but for Touger's allegedly defective advice. There is no support for Ocasio's claim that the Government must charge relevant conduct by indictment and prove it beyond a reasonable doubt. The Second Circuit held this on Ocasio's direct appeal. See also United States v. Norris, 281 F.3d 357, 359 (2d Cir. 2002) (holding that "Apprendi does not apply to enhancements that determine a sentence that is within the applicable statutory maximum" and that "the applicable

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[3]The Apprendi waiver and the reservation of the right to argue that Apprendi applies to the calculation of relevant conduct under the guidelines are set forth in the supplemental plea agreement letter dated March 14, 2001 and signed by the government, Attorney Touger, and Ocasio. [Doc. #122].

[4]The Second Circuit rejected these arguments, stating that "[t]his Circuit's caselaw since Apprendi has stated that uncharged drug quantity may be considered at sentencing as part of a defendant's relevant conduct, so long as the resulting sentence does not exceed the statutory maximum, or cause the imposition of a statutory mandatory minimum sentence. This sentencing factor may be determined by the judge under a preponderance of the evidence standard and need not be submitted to a jury." United States v. Ocasio, 32 Fed. Appx. 5, 5-6 (2d Cir. 2002) (citations omitted).

standard of proof for enhancements is preponderance of the evidence"); United States v. Thomas, 274 F.3d 655, 663-64 (2d Cir. 2001) (en banc) (stating that "[t]he constitutional rule of Apprendi does not apply where the sentence imposed is not greater than the prescribed statutory maximum for the offense of conviction"). The Second Circuit has made clear that issues decided on direct appeal may not be relitigated through a habeas corpus petition. See Riascos-Prado v. United States, 66 F.3d 30, 33 (2d Cir. 1995).

Ocasio now appears to make a new argument apart from his Apprendi claim as to the heroin. He maintains that the heroin was completely unrelated to the charged cocaine conspiracy, and thus it could not be considered as relevant conduct under the Sentencing Guidelines. Apparently, Ocasio is asserting this as part of his ineffective assistance of counsel claim. However, Ocasio repeatedly agreed both at his guilty plea proceeding and sentencing that his heroin involvement constituted relevant conduct for the Court to consider. It was only whether Apprendi required the cocaine and heroin amounts to be charged in the indictment and whether those amounts had to be proved beyond a reasonable doubt that were disputed and reserved as issues for appeal. Moreover, the undisputed facts set forth in the Presentence Report ("PSR"), which were adopted by the Court at sentencing, establish that Ocasio's heroin drug transactions were part of the "same course of conduct" as the offense of conviction under the 1998 Sentencing Guidelines, § 1B1.3(a)(2).

The PSR explains that Ocasio's stipulation to the seven kilograms of heroin is based on his involvement with a conspiracy distributing heroin at the SANA housing complex in Hartford, Connecticut ("SANDS") between July and mid-December 1998. ¶¶ 7, 8. Ocasio's role in the SANDS conspiracy was that of a supplier - he would obtain the heroin in New York and then

distribute the heroin to his close associates in Hartford.[5] ¶¶ 10, 29. A few months after the December 1998 federal arrests shut down the SANDS conspiracy, in early spring 1999, Ocasio recruited two of his co-defendants here, Roger Griffin and Alejandro Sierra, to assist in the distribution of cocaine throughout Hartford.[6] ¶¶ 25, 28, 30. Ocasio's role in the instant conspiracy was the same as his role in the SANDS conspiracy - Ocasio would obtain cocaine in New York and then distribute the cocaine to his close associates in Hartford. ¶¶ 12, 25, 27, 33.

Application Note 9(B) to U.S.S.G. § 1B1.3 of the 1998 Guidelines provided that the factors to consider in determining whether offenses are part of the same course of conduct include: (1) the degree of similarity of the offenses, (2) the regularity (repetitions) of the offenses, and (3) the time interval between the offenses. See also United States v. LaBarbara, 129 F.3d 81, 87 (2d Cir. 1997) (reciting both the sentencing guidelines definition of "same course of conduct" and caselaw definition prior to adoption of guidelines definition); United States v. Silkowski, 32 F.3d 682, 688 (2d Cir. 1994) ("the relevant conduct provision of section 1B1.3(a)(2) is to be interpreted broadly to include: conduct for which the defendant was acquitted; conduct related to dismissed counts of an indictment; conduct that predates that charged in the indictment; and conduct not charged in the indictment" (citations omitted)); United States v. Azeem, 946 F.2d 13, 16 (2d Cir. 1991) (rejecting defendant's claim that heroin should not have been included in calculation of offense level because it was the object of a different conspiracy, with different goals and time frames, and not part of a common scheme).

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[5]Ocasio was not a named defendant in the resulting SANDS indictment.

[6]Count One of the indictment charges conspiracy to distribute "[f]rom on or about July 8, 1999, the exact date unknown, and continuing through and including September 9, 1999 . . . ."

There is a substantial similarity between Ocasio's participation in the SANDS heroin conspiracy and the charged cocaine conspiracy. Ocasio's role in both conspiracies was that of a supplier. Both conspiracies involved large quantities of narcotics. The locations were also the same - Ocasio obtained the narcotics in New York and distributed them in Hartford. In addition, in both conspiracies, Ocasio only distributed sale quantities to his close associates. While the members of the conspiracy may have differed and the kind of narcotics differed, the undisputed facts establish that the offenses were substantially similar. As to the second factor - the regularity of the offenses - the undisputed facts establish that Ocasio was a regular and active participant in both the SANDS heroin conspiracy and the charged cocaine conspiracy. Finally, there were only a few months between the arrests in the SANDS heroin conspiracy and Ocasio's recruitment efforts to start the charged cocaine conspiracy.

This Court also emphasized the substantial similarity between these conspiracies at Ocasio's sentencing on June 18, 2001. The Court pointed out how Ocasio turned to selling cocaine after the SANDS conspiracy was shut down, how Ocasio was responsible for selling large quantities of heroin and then large quantities of cocaine, and how "[like] with the heroin for the Sands, he obtained cocaine for this new operation in New York" and then distributed it in Hartford. Tr. at 25-26. Thus, Ocasio's participation in the SANDS heroin conspiracy was part of the same course of conduct as his participation in the charged cocaine conspiracy. The Court properly considered the seven kilograms of heroin as additional relevant conduct for the purpose of sentencing. Accordingly, Ocasio cannot demonstrate any prejudice based on any allegedly defective advice provided by his attorney as to the inclusion of the heroin as relevant conduct.

2. Upward Departure

Ocasio's argument that Attorney Touger failed to object to an unwarranted upward departure from Ocasio's guidelines range also does not establish that Attorney Touger was ineffective simply because the Court did not depart upward from the applicable sentencing range. Ocasio alleges that the Court imposed a supervised release term which exceeded the maximum guideline range and that his counsel failed to object to this alleged upward departure. The Court sentenced Ocasio to 135 months' imprisonment to be followed by a supervised release term of 60 months. At the sentencing hearing, the Government and Attorney Touger agreed with the Court that Ocasio faced a supervised release term of as much as life and a mandatory minimum of four years under the statutes and that under the Sentencing Guidelines, Ocasio faced a supervised release term of four to five years. Tr. at 10-12. The Court was correct in its review of the penalties Ocasio faced. By imposing a supervised release term of 60 months, which was within the Guidelines range, the Court did not depart from the applicable sentencing range.

B. Constructive Amendment Claim

In an argument related to the relevant conduct issue discussed above, Ocasio maintains that the Court erroneously permitted the United States to "constructively amend" the indictment by including in Ocasio's sentencing guidelines calculation drug trafficking activity for which he was never charged. He alleges that the stipulation to relevant conduct of the seven kilograms of heroin in the plea agreement constitutes a constructive amendment of the indictment since the indictment refers only to cocaine. In addition, he alleges that the drug amount stipulated to was connected to a 1998 investigation, while the indictment refers to a 1999 conspiracy.

"An indictment is constructively amended when the proof at trial broadens the basis of conviction beyond that charged in the indictment." United States v. Patino, 962 F.2d 263, 265 (2d Cir.), cert. denied, 506 U.S. 927 (1992) (citing United States v. Miller, 471 U.S. 130, 144-45 (1985)). A constructive amendment occurs when "the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." United States v. Salmonese, 352 F.3d 608, 620 (2d Cir. 2003) (internal quotations and citations omitted).

This case differs from the cases which discuss constructive amendment because Ocasio pled guilty instead of proceeding to trial. Thus, there was no trial, the Government did not present evidence, and there were no jury instructions. In addition, the stipulation in the plea agreement did not modify an essential element of the offense charged. As the Second Circuit held in ruling on the direct appeal of this case, Apprendi does not require that the cocaine and heroin drug amounts stipulated to for purposes of determining relevant conduct be charged in the indictment. Also, as mentioned above, Ocasio conceded many times that the relevant conduct included the heroin. Accordingly, the stipulation does not constitute a constructive amendment.

Nor does the stipulation in Ocasio's plea agreement constitute a variance. "A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." Salmonese, 352 F.3d at 621 (internal quotations omitted). In order to prevail on a variance claim, a defendant must show prejudice. Id. A variance is not prejudicial where "'the allegation and proof substantially correspond, where the variance is not of a character that could have misled the defendant at the trial, and where the variance is not such

as to deprive the accused of his right to be protected against another prosecution for the same offense.'" United States v. Mucciante, 21 F.3d 1228, 1236 (2d Cir. 1994) (quoting United States v. Heimann, 705 F.2d 662, 669 (2d Cir. 1983)). The indictment charged Ocasio with conspiring to distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine. Ocasio stipulated and agreed that the offense and relevant conduct involved 10 kilograms of cocaine. The Court also took into consideration at sentencing Ocasio's stipulation to 7 kilograms of heroin. This stipulation did not constitute a variance, nor can Ocasio demonstrate that the alleged variance was prejudicial.

C. Rule 11 Claim

Ocasio argues that the Court violated Rule 11 by failing to inform him of the nature and significance of his supervised release term. This claim also is not supported by the record.

Rule 11 of the Federal Rules of Criminal Procedure requires district courts to inform the defendant of, and determine that the defendant understands, the maximum penalties, including the term of supervised release, before accepting a plea of guilty.

The transcript of the plea proceedings held on February 2, 2000 shows that Ocasio was advised of the nature and significance of his supervised release term. At the plea proceeding, the Government outlined the terms of the plea agreement, which set forth that Ocasio faced a term of supervised release of a minimum of four years and as long as life. The Government added that if Ocasio were to violate a term of supervised release, he could be incarcerated for up to three years. The Court then inquired of Ocasio whether the written plea agreement that was summarized by the Government fully and accurately reflected Ocasio's understanding of his agreement with the

Government. Ocasio responded affirmatively.

The Court also specifically advised Ocasio of the penalties he faced if he were to plead guilty, including supervised release. The Court stated that if Ocasio pled guilty, the Court might sentence him to a maximum supervised release term of as much as life, and he faced a mandatory minimum term of four years. The Court also stated that if Ocasio were to violate any conditions of supervised release, the Court could then sentence Ocasio to additional time in prison for as much as three years. When asked by the Court whether he understood all the maximum penalties the Court just described for him, including supervised release, Ocasio said yes. Thus, the record establishes that this argument of Ocasio also lacks merit.

D. Claim that the Seizure of Cocaine Predated Ocasio's Involvement in the Conspiracy

Finally, Ocasio appears to argue that the United States committed misconduct by prosecuting Ocasio because there was no information or evidence that Ocasio had joined the conspiracy *before* the conspiracy was defeated, and thus, he could not be convicted as a conspiracy member. He seems to argue that he was not involved in the conspiracy until after the seizure of cocaine pursuant to the execution of a search warrant in early September 1999 from Roger Griffin, one of Ocasio's co-defendants, and that was when the conspiracy terminated. He appears to argue that he should not have been indicted or convicted based on a Ninth Circuit holding that a conspiracy ends automatically when the object of the conspiracy has been defeated, such as when law enforcement seizes the drugs that were meant for distribution. See United States v. Cruz, 127 F.3d 791 (9th Cir. 2001); United States v.

Recio, 258 F.3d 1069 (9th Cir. 2001).[7]

Ocasio's claims are not supported by the record, however. The indictment charged Ocasio along with co-defendants Alejandro Sierra, Roger Griffin, and Marcos Echevarria with conspiring to distribute at least 500 grams of cocaine between July 8, 1999, and September 9, 1999. At the change of plea hearing on February 2, 2000, the Government summarized Ocasio's conduct that made him guilty of the conspiracy charge and the Government's evidence as to the charge against Ocasio. Tr. at 28-29. The Government stated that the Government would present tape recordings from two telephones utilized by Ocasio and Sierra on July 7, 1999 and early September 1999. The recorded conversations were obtained through court-authorized electronic surveillance and involved Ocasio, Sierra, and Griffin. They discussed distributing cocaine and collecting sale proceeds. The Government also stated that it would present video-taped evidence and testimony of officers conducting physical surveillance that established that Ocasio entered Griffin's apartment on August 27, 1999, at the same time when telephone conversations among the conspirators about the processing of cocaine were intercepted. In addition, the Government stated that the evidence at trial would include the cocaine that was seized from Roger Griffin's apartment in early September 1999. At the conclusion of the Government's summary, the Court asked Ocasio whether he agreed with the Government's summary,

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[7]The Supreme Court, reversing the Ninth Circuit in Recio and abrogating Cruz, recently held that a conspiracy does not end automatically when the object of the conspiracy becomes impossible to achieve, such as when the government frustrates a drug conspiracy's objective by seizing the drugs intended for distribution. United States v. Recio, 537 U.S. 270, 272-74 (2003). See also United States v. Wallace, 85 F.3d 1063, 1068 (2d Cir. 1996) ("That the conspiracy cannot actually be realized because of facts unknown to the conspirators is irrelevant."); United States v. Giordano, 693 F.2d 245, 249 (2d Cir. 1982) ("[I]t does not matter that the ends of the conspiracy were from the beginning unattainable.").

and Ocasio responded affirmatively. Tr. at 30. The Court also asked Ocasio if there was anything the Government said with which Ocasio disagreed, and Ocasio said no.

The Government's summary of Ocasio's conduct and its evidence includes conduct by Ocasio in the conspiracy *prior* to the seizure of cocaine from Roger Griffin. Thus, Ocasio's claim that he did not join the conspiracy until after the seizure of cocaine from Roger Griffin has no merit. The Court also concludes that there was no "misconduct" committed by the Government as the proffer included conduct within the time period charged in the indictment.

III. Conclusion

Ocasios's Motion for Leave to Amend [Doc. #160] and Motion for Leave to Supplement [Doc. #167] are GRANTED. Ocasio's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Docs. #158, 170] is DENIED. The Clerk is directed to close the case. No certificate of appealability will issue as there has been no "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

SO ORDERED this 3rd day of June 2004, at Hartford, Connecticut.

/s/ CFD
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE